

Update: Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Revised Edition)

Part B—Commentary on Pleas

3.38 Withdrawing or Challenging a Plea

Insert the following case summary after the third paragraph near the middle of page 64:

“In the interest of justice” and “substantial prejudice.”

Doubt about the veracity of a defendant’s nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, ___ Mich App ___, ___ (2004). In *Patmore*, the defendant moved to withdraw his no contest plea on the basis that the complainant had recanted her preliminary examination testimony on which the defendant’s plea was based.

A defendant who wishes to withdraw his no contest plea before sentencing must comply with the requirements of MCR 6.310(B). Unless claiming an error in the plea proceeding itself, the defendant has the burden of showing that withdrawal of the plea is in the interest of justice; that is, the defendant must show that there is a fair and just reason for withdrawal. MCR 6.310(B); *Patmore, supra* at ___. If the defendant satisfies this burden, then the prosecution must establish that substantial prejudice would result if the defendant was permitted to withdraw his plea. The *Patmore* Court explained:

“In keeping with this standard, we believe that for recanted testimony, which provided a substantial part of the factual basis underlying a defendant’s no-contest plea, to constitute a fair and just reason for allowing the defendant to withdraw his plea, at a minimum, the defendant must prove by a preponderance of credible evidence that the original testimony was indeed untruthful. If the defendant meets this burden, the trial court must then determine whether other evidence is sufficient to support the

factual basis of the defendant's plea. If the defendant fails to meet this burden or if other evidence is sufficient to support the plea, then the defendant has not presented a fair and just reason to warrant withdrawal of his no-contest plea. Even if the defendant presents such a fair and just reason, prejudice to the prosecution must still be considered by the trial court [internal citations omitted]." *Patmore, supra* at ____.

Because no Michigan case law involved the circumstances presented in *Patmore* (recanted testimony in the context of a defendant's motion to withdraw a nolo contendere plea), the Court of Appeals noted that recanted testimony in the context of a defendant's motion for new trial is generally regarded with suspicion and considered untrustworthy. *Patmore, supra* at _____. In the context of a new trial, a defendant would be required to establish either the veracity of the witness' recanted testimony or the falsity of the witness' initial testimony. *Patmore, supra* at _____. The *Patmore* Court concluded that recanted testimony in both contexts—motions for new trial and motions to withdraw a plea—should be similarly viewed.

In *Patmore*, the defendant argued that the witness' preliminary examination testimony against him was the result of coercion. He claimed that the witness was threatened with losing custody of her child if she did not testify against the defendant. The Court of Appeals reversed the trial court's decision allowing the defendant to withdraw his plea because the defendant

"failed to prove by a preponderance of credible evidence that [the complainant]'s preliminary examination testimony was untruthful, particularly given [the police officer]'s preliminary examination testimony which clearly supported [the complainant]'s original description of the offense and defendant's intent." *Patmore, supra* at ____.